

N.D.A.G. Letter to Wentz (March 24, 1986)

March 24, 1986

Dr. Robert M. Wentz
State Health Officer
North Dakota Department
of Health State Capitol
Bismarck, ND 58505

Dear Dr. Wentz:

Thank you for your letter of March 5, 1986, inquiring as to whether the addition of Magnetic Resonance Imaging to a private clinic's diagnostic radiology service is subject to review for purposes of the Certificate of Need program by the State Health Council under the authority of N.D.C.C. Ch. 23-17.2.

The portions of N.D.C.C. Ch. 23-17.2 which apply to this request are as follows:

23-17.2-02. DEFINITIONS. As used in this chapter, unless otherwise indicated by the context:

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- 4." Capital expenditure" means an expenditure of seven hundred fifty thousand dollars, regardless of the financial mechanism utilized, made by or on behalf of a health care facility which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance.
5. "Construction" means any erection of a new building, new addition to, modification, alteration, renovation, conversion of any existing building, modernization or improvement made by or on behalf of any health care facility. Construction shall not include changes required by state or federal health and safety regulatory agencies.

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14. "Incurring an obligation" means an obligation for a capital expenditure by or on behalf of a health care facility:
 - a. When a contract, enforceable under state law, is entered into by or on behalf of the health care facility

for the construction, acquisition, lease, or financing of a capital asset; or

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16. "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions which is used to provide medical and other health services and which costs more than five hundred thousand dollars. . . .

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23-17.2-03. SCOPE OF COVERAGE OF CERTIFICATE OF NEED PROGRAM -- HEALTH MAINTENANCE ORGANIZATION EXCEPTION. The certificate of need program required under this chapter provides for the following:

1. The department, pursuant to this chapter and rules of the health council, must review proposals subject to this chapter and must approve, disapprove, or revoke the certificate of need, as appropriate. The certificate of need program applies to:
 - a. The obligation by or on behalf of a health care facility of any capital expenditure (other than to acquire an existing facility). The costs of designs, plans, working drawings, specifications, and other activities essential to the acquisition, improvement, expansion, or replacement of any plant or equipment.

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- d. The acquisition by any person of major medical equipment not owned by or located in a health care facility if the department finds that the equipment will be used primarily to provide services to persons who are admitted patients in a health care facility. This does not include use of equipment on a temporary basis as in the case of a natural disaster, a major accident, or equipment failure.

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The above-referenced statutes indicate that major medical equipment (e.g. Magnetic Resonance Imaging) acquired by a private clinic is subject to review only if that major medical equipment is to be used primarily to provide services to persons who are

admitted patients in a health care facility. The proposal in question contains a survey of approximately thirty facilities currently utilizing Magnetic Resonance Imaging that indicates at least seventy-five percent of the utilization in this proposal would be for out-patient services.

A review of legislative history regarding the word "primarily," as utilized in N.D.C.C. § 23-17.2-03(1)(d), would indicate that "primarily" was meant to mean fifty percent or more utilization on behalf of a licensed health care facility. In this instance, no more than twenty-five percent of the utilization will be from persons who are admitted patients in a licensed health care facility.

The entity from which the clinic is leasing space for the Magnetic Resonance Imaging is not a licensed health care facility. It is, instead, a company with close connection to the clinic itself.

If, contrary to commitments in the notification of intent, the actual utilization of the equipment is discovered to be more than fifty percent by persons admitted to a health care facility, the Department may seek injunctive or other relief available through N.D.C.C. Ch. 23-17.2, to ensure that the Certificate of Need process be utilized.

A review of the Notification of Intent attached to your letter indicates that the addition of Magnetic Resonance Imaging by this private clinic is not on behalf of a health care facility and, therefore, is not subject to review for purposes of the Certificate of Need program by the State Health Council.

Sincerely,

Nicholas J. Spaeth
Attorney General

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